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REPORT
99-88

THE STATUE OF LIBERTY-ELLIS ISLAND FOUNDATION, INC.

JUNE 20 (legislative day, JUNE 3), 1985.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 487]

The Committee on the Judiciary, to which was referred the bill (S. 487) to recognize the organization known as the Statue of Liberty-Ellis Island Foundation, Inc., having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The bill S. 487 would grant a Federal charter to the organization known as The Statue of Liberty-Ellis Island Foundation, Inc., and would provide limited trademark protection in connection with the restoration effort of the Statue of Liberty and Ellis Island.

HISTORY

On October 14, 1983, The Statue of Liberty-Ellis Island Foundation, Inc., and the Department of the Interior entered into a Memorandum of Agreement, recognizing the Foundation as a private non-profit organization to raise funds for, and cooperate in a program to restore and preserve, the Statue of Liberty and Ellis Island. Section A, Paragraph 7, of the Memorandum of Agreement specifically states that the Foundation "shall be recognized as the primary fundraiser . . . and individuals will be encouraged to work with and coordinate their fundraising efforts with the Foundation."

In accordance with the Memorandum of Agreement, the Foundation has raised funds through traditional methods, such as soliciting contributions from private citizens, civic groups, and charitable

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institutions, and through a large-scale licensing program. Under the licensing program, corporations have agreed to pay the Foundation royalties for the restoration effort, in return for permission to promote their affiliation with the restoration effort as a method of marketing the goods and services they sell. These corporate licensees have been promised by the Foundation that only corporations which have entered into formal agreements with either the Foundation or the Department of the Interior will be able to link their advertising with the restoration effort. Approximately $138,000,000 has been raised through these fundraising methods.

As a result of the success of the Foundation in making public the plight of the Statue of Liberty and Ellis Island, organizations and corporations having no affiliation, or contractual relationship, with the Foundation or the Department of the Interior have capitalized on the restoration work and are impairing the ability of the Foundation to raise the remaining $100,000,000 necessary to complete the restoration effort.

To remedy this problem, on February 21, 1985, Senator Charles McC. Mathias (R-Md.) introduced S. 487, which would grant a Federal charter to the Statue of Liberty-Ellis Island Foundation, Inc., and which would also provide limited trademark protection to the Foundation for the restoration efforts. Senator Mathias stated:

> The passage of time and exposure to the elements have caused serious deterioration to the Statue of Liberty and the magnificent buildings on Ellis Island. Rather than remain symbols of national pride, these monuments may become a national disgrace. The need to restore them has been recognized nationwide. . . .
>
> A federal charter will not cost the federal government one dime, and it will help the Foundation's board of directors in their efforts to complete the restoration on schedule. The bill I am proposing will also clear any uncertainty about the Foundation's status as the official fundraising body.[1]

STATEMENT

The Statue of Liberty Foundation, Inc., was incorporated in Delaware on November 24, 1981. On June 21, 1982, the name of the organization was changed to the Statue of Liberty-Ellis Island Foundation, Inc., the name under which the organization currently functions.

The operations of the Foundation are linked to two widely-recognized national symbols and are solely for charitable and patriotic purposes. The Foundation has included in its Articles of Incorporation, as part of its Declaration of Purpose, in pertinent part, the following:

> (3) promote and assist the celebrations for the centennial anniversaries of the Statue of Liberty and Ellis Island; and

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[1] 131 Cong. Rec. S1746-S1747 (daily ed. Feb. 21, 1985).

(4) promote, salute, and educate the public regarding the patriotic and pioneering spirit which the Statue of Liberty and Ellis Island represent.[2]

National in scope due to its unique function as the only organization charged by the Interior Department with the responsibility for ensuring that the Statue of Liberty and Ellis Island are properly restored, the Foundation, in accordance with the announcement by President Reagan that no funds for the restoration effort would be appropriated by the Federal Government, has implemented fundraising activities in every State. The funds are either donated to the National Park Service or used directly to pay for various aspects of the restoration effort. The corporation maintains a tax exempt status under section 501 (c)(3) of the Internal Revenue Code.

A Federal charter will provide the Foundation with the additional recognitional value enjoyed by entities such as the United States Olympic Committee and the National Society, Daughters of the American Colonists.

The purpose of this legislation is to recognize an existing organization chartered by the State of Delaware. It does not expand any corporate rights or relieve any corporate responsibilities established by the Delaware charter. Moreover, this legislation specifically requires compliance with the State law or the laws of the District of Columbia governing the election of corporate officers and the responsibilities of the board of directors for the corporation. It also specifically requires compliance with existing State and D.C. laws governing service of process.

In order to assure responsible and appropriate conduct on the part of the corporation, the legislation prohibits certain corporate acts and establishes certain requirements for the corporation. The legislation prohibits the loan or transfer of corporate income or assets to officers, members, or other persons (except for compensation or expenses) or the issuance of stock or the payment of dividends. The legislation requires the corporation to keep certain records, to perform an annual audit, and to report to Congress annually. Should the corporation engage in any prohibited activity or fail to perform any of the requirements established by this legislation, or if the corporation fails to maintain its tax-exempt status, the Federal charter granted by this legislation will expire automatically as a matter of law.

In addition, the legislation provides limited trademark protection for the Foundation against unauthorized commercial use of depictions of the Statue of Liberty or Ellis Island in a manner which falsely represents an affiliation with the Foundation or the restoration effort. It does not prohibit legitimate fundraising organizations from contributing to the restoration effort, nor does it prohibit the use of depictions of the Statue of Liberty and Ellis Island for commercial purposes, as long as the depictions do not falsely represent an affiliation with the restoration effort, with the Foundation, or with the Department of the Interior.

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[2] S. 487, 99th Congress, 1st Session (1985) sec. 3

In recognition of the merits of the organization, there is broad bipartisan support in the Senate for a Federal charter for The Statue of Liberty-Ellis Island Foundation, Inc., despite the fact that it fails to meet one of the traditional requirements for such a charter. At the time of the introduction of S. 487, Judiciary Committee Chairman Strom Thurmond (R-S.C.), a cosponsor of the bill, stated:

> Clearly, the Statue of Liberty-Ellis Island Foundation, Inc., meets the standards for granting of Federal charters established by the Senate Committee on the Judiciary . . . with one exception: the "Permanence" standard. The Committee has not waived this exception for any organization. Granting this charter will be the first exception, and I am willing to agree to this exception only under very strict requirements:
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> First, the charter is essential for the organization to perform a specific national objective;
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> Second, this national objective cannot be properly performed absent such a charter; and
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> Third, the organization was created for that specific objective and is not to be of unlimited duration.
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> Granting a Federal charter to the organization is essential for it to be able to provide its national function: the restoration effort.[3]

S. 487 currently has 55 cosponsors.

COMMITTEE VOTE

On May 2, 1985, with a quorum present, by voice vote and without objection heard, the Committee ordered the bill favorably reported with an amendment in the nature of a substitute.

COMMITTEE AMENDMENT AND EXPLANATION

Senator Thurmond, on behalf of Senator Mathias, offered an amendment in the nature of a substitute in Committee. The changes in the bill were made in response to two letters to Judiciary Committee Chairman Strom Thurmond: one from the Department of Commerce and one from the Department of the Interior. Both of these letters are included in the Agency Views section of this report.

The major changes in the measure are as follows:

On page 2, line 19, the following was added at the end of subsection (2):

> "or directly perform work necessary for the restoration effort in accordance with standards prescribed by the Secretary of the Interior;".

On page 2, line 23, the following language was added after the word "educate":

> ", in consultation with the Secretary of the Interior,".

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[3] 131 Cong. Rec. S1747-S1748 (daily ed. Feb. 21, 1985).

"SEC. 3." was changed to "SEC. 3. (a)" and a new subsection (b) was added at the end thereof:

> "(b) The activities of the corporation shall be conducted in accordance with the terms of the Memorandum of Agreement between the Department of the Interior and the Statue of Liberty-Ellis Island Foundation dated October 14, 1983, as amended or renewed.".

"SEC. 6." was changed to "SEC. 6. (a)" and a new subsection (b) was added at the end as follows:

> "(b) The board of directors of the corporation shall include, as voting members, at least two designees of the Department of the Interior appointed by the Secretary of the Interior.".

The foregoing changes clarify the work the Foundation and its relationship with the Department of the Interior with respect to the restoration effort.

On page 5, line 9 "(66)" was changed to "(68)". This is a technical correction.

On page 6, line 11, "SEC. 17. (a)" changed to "SEC. 16. (a)".

On page 6, line 12, the words "in commerce" were added after "uses".

On page 6, lines 18 and 19, the words "in any manner tending" were deleted and the words "tending falsely" were added in lieu thereof.

On page 6, line 22, the word "falsely" was added after the word "tending".

On page 6, line 24, through page 7, line 6, was deleted and the following was inserted in lieu thereof:

> "(3) any other representation, by words or pictures, in a manner—
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> "(A) tending falsely to represent that the purchase of particular goods or services, or the attendance at, or a viewing of, a performance or broadcast will benefit the restoration effort or the corporation; or
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> "(B) tending falsely to represent an affiliation with the corporation,
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> "shall be subject to a civil action by the corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427, popularly known as the Trademark Act of 1946), as amended."

The changes on page 6 narrow the scope of the measure to the Trademark Act and bring S. 487 in line with the House companion bill.

On page 7, line 7, "(b)" was changed to "(b)(1)" and "October 14, 1983" was changed to "date of enactment of this Act." This changes the date of the exclusionary clause for prior use.

On page 7, line 9, the word "interstate" was deleted.

A new subsection (2) was added at the end of subsection (b)(1):

> "(2) This section shall not be construed to preclude the corporation from seeking any remedy it may have under any other provision of law."

The "Termination" section was moved to the end of the bill, and a sunset provision was added at the end thereof as follows:

> "(b) Upon the expiration of the Memorandum of Agreement between the Statue of Liberty-Ellis Island Foundation, Inc., and the Department of the Interior entered into on October 14, 1983, including any extensions of such Memorandum of Agreement by the parties, this Act shall terminate."

SECTION-BY-SECTION ANALYSIS

Section 1 states the name of the organization, The Statue of Liberty-Ellis Island Foundation, Inc., and grants it a Federal charter.

Section 2 states the corporate powers of the organization.

Section 3(a) states the purposes of the corporation, including fundraising, with respect to the restoration and preservation of the Statue of Liberty and Ellis Island.

Section 3(b) requires that the activities of the corporation be conducted in accordance with the terms of the Memorandum of Agreement between the corporation and the Department of the Interior, including amendments or renewals thereof.

Section 4 provides for service of process and states that the organization shall comply with the laws in the States in which it is incorporated and in which it carries on its activities.

Section 5 states that eligibility for membership in the corporation shall be as provided in the corporation bylaws.

Section 6(a) states that the board of directors of the corporation shall be as provided in the articles of incorporation of the corporation.

Section 6(b) requires that two designees of the Department of the Interior, appointed by the Secretary of the Interior, be included as voting members of the corporation's board of directors.

Section 7 states that the qualificaton for, and election of, corporate officers shall be as is provided in the articles of incorporation of the corporation.

Section 8 prohibits the transfer or loan of corporate income or assets to officers, directors, or employees of the corporation, except for payment of compensation or expenses. Section 8 also prohibits the issuance of stock or payment of dividends and prohibits the corporation, its officers, and its directors from participating in political activity or attempting to influence legislation.

Section 9 states that the corporation shall be liable to the full extent under the applicable laws of the states in which it is incorporated and in which it carries on its activities.

Section 10 requires the corporation to keep books and records of account, minutes of its proceedings, and a listening of the names and addresses of the members having the right to vote. This section states that the books and records may be inspected by any member having the right to vote, or any agent or attorney of such member.

Section 11 requires the corporation to be audited annually.

Section 12 requires the corporation to report annually to Congress concerning its activities, including a statement of receipts and expenditures, during the preceding fiscal year and states that the report shall not be printed as a public document.

Section 13 reserves the right to Congress to alter, amend, or repeal the charter at any time.

Section 14 defines "state" to include the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Section 15 requires the corporation to maintain a tax-exempt status as provided in the Internal Revenue Code.

Section 16(a) allows the corporation to protect (1) any depiction of the Statue of Liberty or Ellis Island surrounded by scaffolding or under repair, falsely representing an affiliation with the corporation or restoration effort; (2) any trademark, tradename, sign, logo, or insignia falsely representing an affiliation with the corporation or restoration effort; (3) any other representation, by words or pictures, falsely representing that the purchase of particular goods or services, or the attendance at, or viewing of, a performance or broadcast will benefit the restoration effort or the corporation or falsely represents an affiliation with the corporation by a civil action pursuant to the Trademark Act of 1946, as amended. This section provides the Foundation with limited trademark protection in connection with the restoration effort. It is intended that only those depictions of the Statue of Liberty and Ellis Island showing repair and restoration work falsely representing an affiliation with the restoration effort or any false representation of an affiliation with the restoration effort or the Foundation itself are covered by this language. This does not affect any other use of depictions of the Statue of Liberty and Ellis Island for commercial purposes. This is the same type of limited trademark protection granted the United States Olympic Committee in the Amateur Sports Act of 1978 and set forth in 36 U.S.C. § 380.[4] See *United States Olympic Committee* v. *Intelicense,* 737 F. 2d 263 (1984) and *United States Olympic Committee* v. *International Federation of Bodybuilders,* 219 U.S.P.Q. 353, 360–361 (D.D.C. 1982).

Section 16(b)(1) provides that persons who, before the date of enactment of this legislation, used any of the depictions, symbols, words, or pictures representing an affiliation with the corporation or restoration effort, for lawful purposes in commerce, shall not be prohibited from continuing such lawful use.

Section 16(b)(2) states that the corporation's remedies under law are not limited to those contained in this section.

Section 17(a) provides for the termination of the Act if the corporation fails to comply with the provisions or restrictions of the Act.

Section 17(b) provides for the termination of the Act upon the expiration of the Memorandum of Agreement, including any extensions thereof, between the Statue of Liberty-Ellis Island Foundation, Inc., and the Department of the Interior.[4]

COST OF LEGISLATION

In compliance with paragraph 11(a), Rule XXVI of the Standing Rules of the Senate, the Committee estimates that enactment of this legislation will involve no direct additional expenditure to the

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[4] S. 2727, 95th Congress, 2nd Session (1978), became Public Law 95–606 (92 Stat. 3045).

Government. The Committee notes the following letter from the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC., May 3, 1985.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 487, a bill to recognize the organization known as the Statue of Liberty-Ellis Island Foundation, Inc., as ordered reported by the Senate Committee on the Judiciary, May 2, 1985. CBO estimates that no costs to federal, state, or local governments will result from the enactment of this bill.

The Statue of Liberty-Ellis Island Foundation, Inc. is an organization presently incorporated under the laws of the State of Delaware. S. 487 grants a federal charter to the foundation and officially recognizes the foundation as a corporation established under federal law. S. 487 places restrictions on some activities the foundation may undertake, provides for the annual auditing of the foundation's accounts by independent certified public accountants, and requires that an annual report of the foundation's activities be submitted to the Congress. This bill also directs that activities of the foundation shall be conducted in accordance with the terms of the Memorandum of Agreement between the Statue of Liberty-Ellis Island Foundation, Inc. and the Department of the Interior entered into October 4, 1983.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT

In compliance with paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee has concluded that this legislation does not create any new regulations with which the public must comply.

CHANGES IN EXISTING LAW

In compliance with paragraph 12, Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 487, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 36—PATRIOTIC SOCIETIES AND OBSERVANCES

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CHAPTER 42—AUDITS OF FEDERALLY CHARTERED CORPORATIONS

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§ 1101. Definition of private corporations established under Federal law

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(68) The Statue of Liberty-Ellis Island Foundation, Inc.

AGENCY VIEWS

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, DC, March 27, 1985.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for our comments on S. 487, a bill to recognize the organization known as the Statue of Liberty-Ellis Island Foundation, Inc.

The Statue of Liberty-Ellis Foundation, Inc., is a private nonprofit corporation working closely with the Department of Interior and the Statue of Liberty-Ellis Island Commission established by the Secretary of Interior under the Federal Advisory Committee Act. Pursuant to a Memorandum of Agreement with Interior, the Foundation raises the funds and contracts for the work necessary to restore and preserve the Statue of Liberty and Ellis Island. A notice published in the Federal Register on February 7, 1985 at page 5325 states that while it is the policy of the National Park Service to accept directly private donations for the restoration of the Statue of Liberty and Ellis Island, donations generated by commercial solicitations will only be accepted when the solicitation is conducted by or in participation with the Foundation.

Except with respect to Section 17 of the bill which provides remedies under the Trademark Act of 1946, the Department of Commerce defers to the views of the Department of the Interior on S. 487. Section 17 provides remedies under the Trademark Act for the Foundation against unauthorized commercial use of depictions of the Statue of Liberty or Ellis Island in a manner "tending" to represent any affiliation with the Foundation or the restoration effort. It also provides the same remedies for unauthorized commercial use of any symbol or representation "tending" to represent any affiliation with the Foundation or the restoration effort. Commercial use includes promotion of theatrical, motion picture, or television performances or broadcasts.

The Department recognizes that licensing the commercial use of depictions of the Statue of Liberty and Ellis Island to be used in a manner indicating a connection with the restoration effort is a very important aspect of the Foundation's fund raising activities. The main thrust of Section 17 of the bill is to prevent businesses from advertising that they are helping with the restoration effort unless thay have been licensed by the Foundation to do so. Without Section 17, the Foundation, in order to receive remedies under the Trademark Act, would depend on Section 43(a) thereof under which it would be able to bring a civil action against any person who uses in commerce, in connection with any goods or services, any false description or representation, including works or other symbols tending falsely to represent the same.

Section 17 of the bill is broader than Section 43(a) of the Trademark Act in that the commercial "use" it prohibits does not appear to be limited to use in interstate commerce or commerce with foreign nations and Indian tribes as is true of the Trademark Act. It is also broader because the proscribed depictions, symbols or representations need only be "tending to" represent any affiliation with the Foundation or the restoration effort rather than "falsely" representing such affiliation.

Because a remedy is already available under the Trademark Act, the need for a similar remedy to be included in S. 487 is questionable. In addition, such action would encourage other non-profit charitable organizations to seek statutory protection of their emblems and symbols when protection is available either through Federal registration of their marks or the unfair competition provisions of section 43(a) of the Trademark Act. Nevertheless, if it is determined that Section 17 should be retained in the bill, we believe that it should be drafted to correspond to the provisions of the Trademark Act. Thus, the use must be use in commerce, and such use must falsely represent affiliation with the Foundation or the restoration effort.

If Section 17 is retained, the Patent and Trademark Office has recommended that it also be revised to eliminate certain technical problems:

> In order to provide the clarity and precision needed for judicial administration, the limitation on use of depictions of the Statue of Liberty need to be expressed. It should be made clear that the bill limits use of depictions of the statue only under restoration, and not all depictions of the statue. For the same reason the phrase "express or implied" in subection (a)(3) should be deleted because an "implied representation" is indefinite and the term "express" is superfluous.
>
> The date in subsection (b), the exclusionary clause for prior use, can be no earlier than the date of enactment. The date October 3, 1983, appears to be related to the Memorandum of Agreement. However, that agreement was only between the Department of Interior and the Foundation and should not be determinative of the rights of other parties.
>
> Finally, the restoration efforts are expected to be completed in time for the celebration scheduled in July 1986 and the Memorandum of Agreement with the Interior Department ex-

pires October 14, 1987. Accordingly, there should be a sunset provision terminating this section of the bill.

With the changes we have recommended, the Department of Commerce would not object to the enactment of this legislation. We have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

RICHARD H. SHAY,
Acting General Counsel.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, April 2, 1985.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 487, a bill "To recognize the organization known as the Statue of Liberty-Ellis Island Foundation, Inc."

We recommend the enactment of S. 487, if amended as suggested below.

The Statue of Liberty-Ellis Island Foundation, Inc., is a private, non-profit corporation working closely with the Department of the Interior and the Statue of Liberty-Ellis Island Commission, an advisory body organized under the Federal Advisory Committee Act. Under a memorandum of agreement with this Department, the Foundation raises the funds and contracts for the work necessary to restore and preserve the Statue of Liberty and Ellis Island.

S. 487 would provide a Federal charter for the Foundation and recognize and protect its unique role in the fundraising efforts associated with the restoration. It would accomplish the latter goal by creating a limited protective trademark status for representations, of, or the affiliations with, the restoration effort, as was done for the United States Olympic Committee.

We support this goal, and we recommend the following clarifying amendments:

1. On page 2, line 19 of S. 487, as introduced, change the semicolon to a comma and add the following:

> "or directly preform such work in accordance with standards prescribed by the Secretary of the Interior; and".

This amendment would make it clear that the Foundation (corporation) shall have as part of its "objects and purposes" the ability to perform restoration work directly.

2. On page 2, line 23, after the word "educate" insert the following:

> ", in consultation with the Secretary of the Interior,".

The responsibility for public interpretation, as it concerns operation of the Statue and Ellis Island, should continue to remain with the Secretary, and this langauge is meant to clarify that relationship.

3. On page 2, line 10, change "Sec. 3." to "Sec. 3.(a)", and after line 25, insert the following new subsection:

> "(b) The activities of the corporation shall be conducted in accordance with the terms of the Memorandum of Agreement between the Department of the Interior and the Statue of Liberty-Ellis Island Foundation, dated October 14, 1983, including any renewal thereof."

The referenced agreement sets forth with precision the duties, responsibilities, and day-to-day operating procedures that define and govern the relationship between the Foundation and the United States with respect to the restoration effort. To the extent that S. 487 would charter the corporation, the bill should incorporate the provisions of that agreement.

4. On page 6, line 8, delete the period and add the following:

"and the provisions of this Act shall lapse."

This amendment would clarify the effect of terminating the charter.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. CRAIG POTTER,
Acting Assistant Secretary.

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